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No. 83-507

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

CARPENTERS PENSION TRUST FOR
SOUTHERN CALIFORNIA,

Petitioner,

vs.

SHELTER FRAMING CORPORATION
and G & R ROOFING COMPANY,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit.

Opposition of Respondent
Shelter Framing Corporation

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Respondent Shelter Framing Corpora-
tion respectfully prays that the peti-
tion of the Carpenters Pension Trust
for Southern California for Writ
of Certiorari to issue to review the
unanimous Judgement of the United

States Court of Appeals for the Ninth Circuit entered on May 20, 1983 be denied.

I.

OPINIONS BELOW

The Opinion of the U.S. Court of Appeals for the Ninth Circuit is reported at 705 F.2d 1052. The Order of the Court denying the Petition for Rehearing and Suggestion for Rehearing En Banc, as amended, filed October 4, 1983, is not reported. The Opinion of the U.S. District Court is reported at 543 F.Supp 1234. These are attached to the Petition as Appendices A, B, and C.

II.

JURISDICTION

Petitioner seeks to involve this Court's discretionary jurisdiction under 28 United States Code Section 1254(1). For the reasons outlined

below, it is recommended that the Court decline to exercise its jurisdiction in this case.

III.

STATEMENT OF THE CASE

On September 26, 1980, Congress enacted the Multi-employer Pension Plan Amendments Act of 1980 (MPPAA), 29 USC §1381, et seq. By express provision, the Act was made to apply both retrospectively by altering contractual obligations of employers under negotiated multi-employer pension plans and retroactively to actions taken by employers participating in such plans from the date of enactment to a date 150 days earlier, April 26, 1980. 29 USC §1461(e)(2)(A).

Under the prior controlling legislation in this area, the Employees Retirement Income Security Act (ERISA),

29 U.S.C. §§1001, et seq, employers who, after negotiations with a union, ceased contributing to a multi-employer pension plan incurred no liability upon withdrawal from the plan, but remained contingently liable for a period of five years only in the event the subject plan terminated within such period. Absent such plan termination the employers were not subject to any liability.

Under MPPAA, ERISA's contingent withdrawal liability was replaced by a retroactive scheme which imposes absolute liability for an employer's proportionate share of the plan's unfunded vested benefits, assessable immediately upon the employer's withdrawal from the plan, 29 USC §§1381 through 1399, and regardless of the plan's overall fiscal health or viability. The imposition of this totally

unsuspected liability was not only retro-
spectively applied by creating a liability
which did not previously exist, but
it imposed such liability retroactively
for a four month period prior to the
enactment of the MPPAA in violation of
due process guarantees of the 5th
Amendment to the U.S. Constitution.
The statutory "withdrawal" in this case
occurred within the retroactive period.
Absent the retroactive application of
the MPPAA the Respondent would have no
liability to the Petitioner.

Respondent, Shelter Framing
Corporation (Shelter) is an employer
which, pursuant to a collective bargain-
ing agreement with a local of the
United Brotherhood of Carpenters and
Joiners of America (Carpenters Union),
contributed to the multi-employer
pension plan of Petitioner, Carpenters

Pension Trust of Southern California (CPT) from 1976 until 1980. That collective bargaining agreement terminated on July 1, 1980. Upon the failure of Shelter and the Carpenters Union to reach a successor agreement, and upon reaching an impasse in negotiations, pursuant to the terms of the final offer submitted, Shelter's contractual obligation to contribute to the CPT pension plan and under labor law came to an end on July 16, 1980. Shelter upon notice to its employees, the union, and CPT, ceased making contributions on August 12, 1980, more than one month prior to the enactment of the MPPAA.

At the time Shelter's obligation to contribute to CPT ended, the Respondent did not know that the Bill to enact

the MPPAA was pending in Congress.^{1/} Shelter pursued its course of conduct in negotiating with the Carpenters Union, and in submitting its final offer in response to the Union's failure to agree to a successor agreement, in accordance with ERISA provisions applicable at the time. Under ERISA's provisions Shelter could not continue to make fringe benefit contributions after an impasse had been reached in the negotiations.

On April 24, 1981, the Trustees of CPT assessed against Shelter a claim for withdrawal liability retroactively created by the provisions of the

^{1/} The Congressional Record shows that the MPPAA underwent numerous amendments and changes as late as July and August of 1980. Congressional Record, July 29, 1980, §§10168 (AD 73). Respondent could not then have known what shape the act would finally take.

Act, totaling \$922,489 including interest for monthly payments. Shelter was financially unable to make the first monthly payment of \$22,737 whereupon CPT accelerated the total liability and demanded immediate payment of \$797,648. Shelter admitted it had "withdrawn" from the Trust under the terms of the MPPAA, but refused to make any payments on the liability claims. On August 28, 1981, Shelter filed suit against CPT in the United States District Court for the Central District of California, seeking to enjoin the collection of withdrawal liability on constitutional grounds. The case was consolidated with another, brought by an employer, G & R Roofing Company (G & R), against CPT on similar grounds. Both Shelter and G & R filed motions for preliminary injunctions

against attempts by the Trustees of CPT to collect the assessed liabilities. The Trustees answered and counter-claimed for collection of the assessed withdrawal liability in both cases. Senior District Court Judge Irving Hill granted the motion for preliminary injunction.

The parties then filed cross motions for summary judgment on a joint statement of stipulated facts. The Court allowed the Pension Benefit Guaranty Corporation (Guaranty Corporation), a government corporation which administers a system of pension termination insurance under ERISA, to participate as *amicus curiae*.

After hearing arguments, the Court held that the MPPAA was unconstitutional as applied to both Shelter Framing and G & R Roofing. The Court, moreover,

expressly found that Shelter had no knowledge of the pending MPPAA legislation at the time it withdrew from CPT, and that if Shelter had known of the Bill's potential application to its conduct, it would have followed another course of conduct to avoid the imposition of liability. 543 F.Supp. 1234, 1249-1250, 1255. Finally, the Court awarded attorneys' fees to plaintiffs under the authorization of the MPPAA at Section 1451(e).

The Trustees of CPT appealed the judgment in each case to the U.S. Court of Appeals for the Ninth Circuit. There, Judge Hill's decision was affirmed as to both the constitutional invalidity of the MPPAA as applied to Shelter, and the propriety of the award of attorneys' fees under 29 USC §1451(e).

CPT petitioned the U.S. Court of Appeals for the Ninth Circuit for rehearing and suggested hearing en banc. The Court denied any rehearing in an Order dated September 13, 1983, as amended by Order dated October 4, 1983.^{2/}

IV.

SUMMARY OF ARGUMENT

Rule 17 of the Rules of the Supreme Court provides for review of a lower court decision on certiorari. The rule specifically states that review on writ of certiorari is a matter of judicial discretion and will be granted only where there are special

^{2/} Similarly, the Petition for Rehearing or Rehearing En Banc by the amicus curiae, the Pension Benefit Guarantee Corporation, in the related appeals before the U.S. Court of Appeals for the Ninth Circuit (Appeals Nos. 82-5271 and 82-5272) were denied by Order of the Court of Appeals filed on October 4, 1983.

and important reasons favoring such review. Rule 17.1. In this regard, the rule provides a list of factors which illustrate the nature of the reasons for which a writ of certiorari may be granted.

Petitioners, CPT, expressly rely on the existence of a conflict between decisions of the Ninth and Fourth Circuits of the United States Court of Appeals as the basis upon which review of the Ninth Circuit's decision in Shelter Framing Corporation v. Carpenters Pension Trust, 705 F.2d 1502 (1983) should be granted. As expressed by Petitioners, the conflict between the Ninth and Fourth Circuits concerns the constitutionality of the retroactive withdrawal liability provisions of the MPPAA, 29 USC §1381, et seq. The Ninth Circuit in Shelter Framing, affirmed

the decision of the United States District Court that the act as applied retroactively to Shelter Framing Corporation is unconstitutional. The Fourth Circuit, in Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund, et al, ____ F.2d ____ (4th Cir., Sept. 9, 1983), affirmed the decision of the District Court in ruling that retroactive application of the MPPAA to the plaintiff there was constitutional.

In seeking review of the Ninth Circuit's decision that the retroactively created liability imposed by MPPAA on Respondent Shelter is constitutionally invalid, Petitioners necessarily, though only impliedly, assert that the alleged conflict imposed by the decisions of the Ninth and Fourth Circuits is of a nature sufficiently

special and important to merit this Court's discretionary review.

In fact that conflict is not one of general national importance. Rather any conflict which exists between the Circuits regarding MPPAA arises out of the courts' respective evaluations of factual matters common to both cases but affording a difference of judicial interpretation.

Finally, the Petitioners' contention that the Ninth Circuit erroneously awarded attorneys' fees under 29 USC §1451(e) to the prevailing party below does not affect the character of this case for purposes of review on certiorari. The Ninth and Fourth Circuits explicitly agree in reading the statute to provide for an award in this case. The courts' award of attorneys' fees, moreover, is consistent

with established principles governing such awards.

V.

ARGUMENT

A. THERE IS NO CONFLICT BETWEEN THE DECISIONS OF THE NINTH AND FOURTH CIRCUITS.

Petitioner argues that a conflict between the Ninth and Fourth Circuits of the U.S. Court of Appeals on the issues here involved provides grounds for this Court's review of the Ninth Circuit's decision in Shelter Framing. Respondent respectfully suggests there is no conflict between the Circuits and the case does not merit the Court's discretionary review on that basis.

The Ninth Circuit held, in Shelter Framing Corporation v. PBGC, that retroactive application of the MPPAA liability provisions violated the

plaintiff employer's rights to due process as guaranteed by the Fifth Amendment. 705 F.2d at 1514. The Fourth Circuit, in Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia, held that the provisions of the MPPAA for retroactive withdrawal liability are valid and constitutional as applied to the plaintiff employer there. _____ F.2d _____.

Both Courts explicitly acknowledge that the test for constitutionality of economic legislation intended to apply retroactively is one of "rationality". Both Courts also recognize the four factors identified by the Seventh Circuit in Nachman Corporation v. PBGC, 592 F.2d 947 (7th Cir., 1979) aff'd on other grounds 446 U.S. 359, (1980) as the proper criteria for the determination of the rationality of challenged

legislation in the cases before them.

Shelter Framing, 705 F.2d at 1511;

Republic Industries, ____ F.2d. at ____.

As stated by the Nachman Court and
as applied by both the Ninth Circuit in
Shelter and the Fourth Circuit in
Republic,

"[r]ationality must be determined by a comparison of the problem to be remedied with the nature and scope of the burden imposed to remedy that problem. In evaluating the nature and scope of the burden, it is appropriate to consider the reliance interests of the parties affected... whether the impairment of the private interest is affected in an area previously subjected to regulatory control, ...the equities of imposing the legislative burdens, ...and the inclusion of statutory provisions designed to limit and moderate the impact of the burdens".
Nachman Corp. v. PBGC,
592 F.2d at 960 (Citations Omitted).

The Nachman "test" identifies four factors to be evaluated by a court, faced with a challenge to economic legislation, in the context of specific case facts. The factors provide only guidelines, however. Application of the "test" necessitates analysis of facts and appreciation of circumstances which admittedly may afford different interpretations.

The evaluative process necessitated by the Nachman test accounts for the alleged conflict cited by the Petitioners. The greater part of both the Shelter and Republic decisions concerns the courts' application of the Nachman analysis to the facts involved.

Where the two cases share common facts, the two courts reach identical conclusions. For example, the facts concerning prior regulation in the area

of pension plans, and the inclusion of moderating provisions in the MPPAA, are deemed by both courts to weigh in favor of retroactive application of the MPPAA.

Unique facts in each case, however, force the courts to different conclusions regarding the reliance and equity factors of the Nachman test. At least one court explicitly recognizes that the result in Shelter may be accounted for by the unique facts in that case. See: Peick v. PBGC, 539 F.Supp. 1025, 1056 n. 79 (N.D. Ill. 1982).

The District Court in Shelter explicitly found that the plaintiff employer had no knowledge of pending MPPAA legislation, acted in deliberate accord with then effective provisions of ERISA, and would have acted differently if the MPPAA had been applic-

able at the time it withdrew from the pension plan involved. Shelter could have adopted a number of different courses of action, which under the later enacted MPPAA would have completely avoided the statutory withdrawal liability. However, because of the retroactive application of the MPPAA, Shelter, was unable to anticipate the need for such alternative action at the time it lawfully ceased to make contributions to CPT.

Shelter, moreover, involved an employer representing only a small proportion of the total contributions to the plan involved there, and whose withdrawal was found to pose no threat of disruption to the plan. In the Ninth Circuit's interpretation of these facts, the reliance interests of the employer were deemed to preponderate

and weigh against validity of the MPPAA's retroactive application.

There are no comparable facts of employer reliance in Republic. The facts do show, however, that the pension fund involved there viewed the employer's withdrawal as posing a threat of substantial damage to its contribution base. The Fourth Circuit determined that the reliance interests of the fund's beneficiaries were paramount under those circumstances.

The record in Shelter, furthermore, details the burden retroactively imposed upon the employer by the MPPAA. The total liability assessed by CPT exceeded twice the employer's net worth. CPT's proposed schedule for payment of the liability required annual payments exceeding 60 percent of the employer's net worth. On these

facts the Ninth Circuit determined the burden of the MPPAA to be inequitable as applied to Shelter.

To the Court in Republic, faced with an employer of substantial size, doing business in several states, and contributing to numerous multi-employer pension funds, the balance of legislative objectives and burdens could be differently viewed. Under those circumstances, the Fourth Circuit found the equities to weigh in favor of retroactive application.

All Courts that have dealt with the issue agree that the Nachman analysis is the test to be applied in determining the validity of the MPPAA's retroactive application. Petitioners' prayer for certiorari fails to take into account that the test must necessarily be applied by different courts

to different facts. Unless this Court would alter the Nachman test itself, review of the Ninth Circuit's decision in Shelter Framing, will force upon the Court the task of re-evaluating facts closely and diligently considered by the courts below. The issues here do not merit such review.

B. THE DECISION OF THE NINTH
CIRCUIT IN SHELTER FRAMING IS
FAIR AND PRACTICAL.

The record shows that employer Shelter contributed to CPT in accordance with provisions of its collective bargaining agreement. The agreement expressly provided that the employer's liability was limited to the obligation of making contributions for each hour worked by its jurisdictional employees at the collectively bargained contribution rates. The employer never agreed to be responsible for any benefits

promised under the plan and the CPT plan explicitly excluded such responsibility and liability.

Shelter, moreover, as a single employer who only assented the results obtained at collective bargaining negotiations between the Carpenters Union and the Contractors Associations, could not directly participate in any meaningful fashion in the collective bargaining negotiations. It certainly had no input in the results obtained through those negotiations. Similarly, Shelter had no ability to influence in any way the decisions of the Trustees of CPT in setting the benefits to be paid to individuals covered under the subject multi-employer pension plan.

Shelter not only relied on the existing state of the law, but predicated its conduct upon the contractual

obligations in the collective bargaining agreement with the union, and upon the Trust Plan of CPT which was incorporated therein. The collective bargaining negotiations between the Carpenter's Union and Shelter were conducted within the framework of the parties then-existing contractual and statutory obligations. The Union voluntarily discontinued negotiations and disclaimed interest in representing the employees of Shelter. Accordingly it would be totally inequitable after such conduct for this Court now to recognize and burden the employer with an obligation which was not known or disclosed to the employer at a time when the employer, armed with such knowledge, could have made the appropriate alternative arrangements.

The employees of Shelter were not burdened or adversely affected by Shelter's withdrawal from CPT because CPT is an ongoing pension plan which is currently paying all vested benefits to its participants. Employees in the construction industry, are hired from job to job. They usually have no permanent connection to one signatory employer, and rely, if at all, only on a plan's overall soundness and not upon the continued participation of any one particular employer. It is also obvious just from the perspective of relative size, that the withdrawal of Shelter from the pension plan had absolutely no effect upon the ongoing financial health of CPT since the amount of Shelter's withdrawal liability was determined to be less than one-

quarter of one percent (.002%) of the plan's total unfunded vested liability.

The equities of the respective parties to this action were properly weighed by the U.S. Court of Appeals for the Ninth Circuit. In light of the special facts and circumstances entailed by this case, the Ninth Circuit's application of the Nachman test and invalidation of the liability assessed against Shelter produces a result that is fair and equitable.

C. THERE IS NO LEGITIMATE ISSUE
REGARDING AWARD OF ATTORNEYS'
FEES UNDER THE MPPAA.

The Ninth Circuit's award of attorneys' fees under the MPPAA does not merit review by this Court. While the issue of attorneys' fees is of unquestionable importance to the litigants, it lacks that degree of importance identified by Rule 17 as the

principal criterion for the Court's discretionary review.

The Ninth and Fourth Circuits are in complete agreement regarding construction of the fee award provisions of the MPPAA. 29 USC §§1451(a)(1) and 1451(e). The Ninth Circuit in Shelter, indicated that the statute should be applied according to the plain meaning of its terms. Accordingly, the Court held the statute applicable to the action before it and awarded attorneys' fees to the prevailing party, Shelter. The Fourth Circuit Court of Appeals, expressly relying on the Ninth Circuit's construction of the statute, held the fee award provision applicable to the Republic case, and awarded attorneys' fees to the prevailing party there. Neither Court expressed any need for

any guidance in awarding attorneys' fees under the MPPAA.

The principles governing Court awards of attorneys' fees to litigants are well established. Additionally, the language of the MPPAA's fee award provisions is simple and straightforward. As the Ninth Circuit noted in Shelter, the statute contains no language which can be construed to restrict the meaning of its terms. As reflected by the results in Shelter and Republic, employers and pension funds both may equally avail themselves of the statute's authorization of fee awards. In so well settled an area of the law, and absent any uncertainty as to the meaning of the statute's provisions, there is clearly no need for review of the Ninth Circuit's attorney fee award.

VI.

CONCLUSION

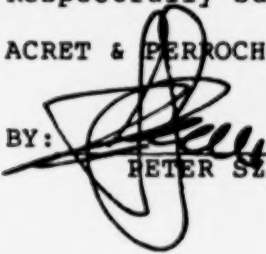
The requirements of Rule 17 for review on certiorari, that a case present issues both important and special, is not met by this case. The issues involved are important to the litigants, but not to the nation at large. The decisions of the Ninth and Fourth Circuits, moreover, demonstrate that questions concerning retroactive application of the MPPAA can be resolved at that level of the Federal Court system. Respondent respectfully suggests that the decision of the Ninth Circuit Court of Appeals in Shelter Framing does not warrant this Court's extraordinary review, and prays that

the Court not exercise the discretionary jurisdiction invoked by petitioners.

Respectfully submitted,

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